

**OPEN SESSION
AGENDA ITEM**

704 JANUARY 2018

DATE: January 27, 2018

TO: Members, Board of Trustees

FROM: Suzanne Grandt, Assistant General Counsel and Dag MacLeod, Director,
Office of Research & Institutional Accountability

SUBJECT: Proposed Rule of Court Re Fingerprinting Active Licensed Attorneys -
Return From Public Comment and Operational Planning and Preparation

EXECUTIVE SUMMARY

On November 3, 2017, the Board of Trustees (Board) authorized a 45-day public comment period for a proposed California Supreme Court (Court) rule implementing a fingerprinting requirement for active licensed attorneys pursuant to recent amendments to Bus. & Prof. Code § 6054, effective January 1, 2018. Over 2,600 public comments were received.

This agenda item is divided into two major parts. The first part summarizes and responds to the public comments including proposed changes to the rule stemming from the comments received. The proposed changes to the rule do not impact the purpose of the rule, which is to require licensed attorneys to be fingerprinted and to pay the fingerprint processing and furnishing costs in connection therewith. Staff recommends that the Board authorize an additional 30-day public comment period for the amended proposed rule of Court.¹

The second part of this agenda item provides a detailed overview of the work completed to date in preparation for fully implementing the proposed rule by the deadline established by the Board of Trustees of December 1, 2019.

¹ Attachment 1 provides the clean text of the amended proposed rule. Attachment 2 provides the redline/strikeout version of the rule, showing changes to the amended proposed rule from the original proposed rule issued for the 45-day public comment period.

PART ONE

RETURN FROM PUBLIC COMMENT: BACKGROUND

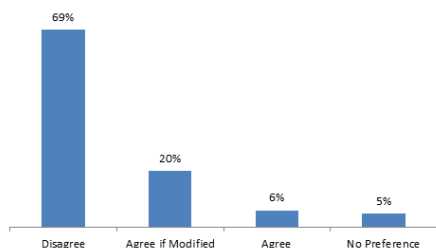
On November 3, 2017, the Board authorized a 45-day public comment period for a rule implementing a fingerprinting requirement for active licensed attorneys. The corresponding Board agenda item is provided as Attachment 3. The comment period began on November 9, 2017, and closed on December 26, 2017.

On December 7, and December 11, 2017, the State Bar sent out two emails to California attorneys (both active and inactive) informing them that the “State Bar plans to re-fingerprint active attorneys.” The email directed attorneys to the State Bar website page for the proposed rule accessible to all members of the public at <http://www.calbar.ca.gov/About-Us/Our-Mission/Protecting-the-Public/Public-Comment/Public-Comment-Archives/2017-Public-Comment/2017-15>.

A link to the public comment page was also featured on the State Bar homepage for approximately three weeks. Lastly, a short description regarding the rule and a link to the public comment page was also posted multiple times on the State Bar’s public Facebook page and Twitter account.

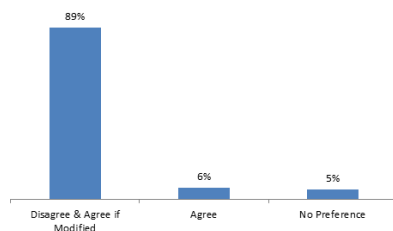
The State Bar received 2,604 public comments. The full text of these comments is provided as Attachment 4.

Figure 1 summarizes the comments according to agreement with the proposed rule:



Notably the commenters who “agreed only if modified” primarily expressed identical concerns as those who “disagreed” with the rule, making the distinction inconsequential. For instance, many attorneys “disagreed” with the rule because they felt they should not have to pay for the fingerprinting, while other attorneys “agreed only if modified” because they felt the rule should be altered to remove the payment requirement or to shift the costs to the State Bar.

Figure 2, therefore, combines “disagree” with “agree only if modified”:



I. Public Comments: General Observations

As reflected in the tables above, the comments were overwhelmingly negative. Notably, the vast majority of comments were received from attorneys, a group not expected to view the proposed rule favorably. Attorneys expressed strong disagreement with the proposition that they would be asked to re-submit fingerprints, and pay for such re-submission, when they had already provided fingerprints upon application for admission to the State Bar. The vast majority of commenters expressed concerns reflecting similar themes: that the rule is unnecessary, redundant, time consuming, expensive, ineffective, insulting and a violation of privacy.

Moreover, attorneys were understandably confused as to why the fingerprints they had submitted during the admissions process were not sufficient. Attorneys also had numerous questions regarding details of the re-fingerprinting process, such as costs and implementation procedures, and how the State Bar plans to use criminal history information, specifically arrests, upon receipt. Part Two of this report provides the overview of implementation procedures developed to date. If the proposed rule is adopted by the Court, these procedures, along with instructions and a Frequently Asked Questions document, will be published by the State Bar.

II. DISCUSSION

The chart below reflects a summary of the issues, concerns, reactions and/or questions raised in the public comments, organized into 24 categories. The majority of written comments fall into 2-5 categories. Although it is difficult, if not impossible, to fit every impression and/or comment into a specific category, staff read all 2,604 public comments and used its best efforts to categorize them by general topic and/or issue.

Comments that simply stated “agree” or “disagree” with no explanation are not included in this chart. Comments that did not articulate a question, topic, or issue were also not included. For instance, many comments summarily indicated that the proposed rule was “ridiculous” or “stupid.” Certain topics and/or issues may also not be included in this chart due to the fact that the comments were not logically comprehensible, and/or the issues raised were inapplicable.

Comments that agreed with the proposed rule without modification are not included in this chart; however, these comments are equally important. Excerpts of some of these favorable comments received are provided following the chart.

	Category	#	Response
1	Burdensome: The rule creates an unnecessary burden on both the attorney as well as the State Bar ² .	548	<p>All licensing requirements impose some burden. Importantly, this is a one- time requirement. It is at most a few hours out of an attorney's day, which is negligible compared to the other licensing requirements mandated by the State Bar, such as Mandatory Continuing Legal Education. The State Bar will provide attorneys with a list of Live Scan locations in California, organized by county (available at https://oag.ca.gov/fingerprints/locations). Larger businesses, such as law firms, as well as county law associations and other groups are also encouraged to bring fingerprint processing services on site.</p> <p>Any burden (to either the State Bar or attorneys) is outweighed by the public protection value of having all active attorneys' fingerprints on file</p>

² The burden to out-of-state and foreign attorneys is addressed in a subsequent category.

			with the California Department of Justice (DOJ) for the purpose of subsequent arrest notification (SAN).
2	<p>No legitimate public protection purpose: The rule serves no legitimate purpose and is generally unnecessary.</p>	512	<p>The State Bar is acting pursuant to the California legislature and Court's determinations that arrest notification for active licensed attorneys is an essential component of the State Bar's public protection mission.</p> <p>Bus. & Prof. Code § 6054 was amended in 1989 to require fingerprint retention for the express purpose of arrest notification subsequent to State Bar admission.</p> <p>The Court recently reiterated the importance of SAN in its October 20, 2017, letter to the State Bar. See Attachment 3, at p. 11. In this letter, the Court directed the State Bar to implement a re-fingerprinting requirement, because "requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system." <i>Id.</i></p> <p>There are numerous other California professions that require licensee fingerprints to be retained by the DOJ in order to receive SAN. These professions include, but are not limited to, physicians, surgeons, professional fiduciaries, certified public accountants, real estate appraisers, proprietary private security officers, immigration consultants, massage therapists, dental hygienists, and polysomnographic technologists.</p> <p>As with other California licensing entities, the State Bar endeavors to ensure it receives SAN for its licensees in order to effectively regulate the legal profession and protect the public. While attorneys were all fingerprinted upon admission, good moral character requirements should not, and do not, end after an individual is admitted to the State Bar. This is the rationale underlying Bus. & Prof. Code § 6101 ("Conviction of a felony or misdemeanor, involving moral turpitude, constitutes a cause for disbarment or suspension.") and Bus. & Prof. Code § 6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.").</p>
3	<p>Already fingerprinted: The rule is redundant and unnecessary because all attorneys were already fingerprinted.</p> <p>Many attorneys were also already fingerprinted for</p>	697	<p>While attorneys were fingerprinted prior to their admission to the State Bar, neither the State Bar nor the DOJ was retaining the vast majority of those fingerprints until August 2017.</p> <p>Specifically, attorneys who submitted fingerprints using Live Scan technology (those residing in California when they applied for admission), had their fingerprints submitted directly to the DOJ and the FBI for a background check. The State Bar never received those fingerprints, so they were unable to retain them. These fingerprints were also not retained by the DOJ or FBI, as there was no contract in place with either entity mandating fingerprints be retained until the August 28, 2017, contract with the DOJ.</p> <p>Attorneys who resided outside of California when they applied for</p>

	other purposes, such as for employment or other license applications/renewals.		<p>admission submitted fingerprint images to the State Bar using a hard copy fingerprint card. The State Bar then transmitted these images to the DOJ and the FBI. Prior to August 28, 2017, the State Bar was only retaining these hard copy cards for a three-year period. After this three-year period, the fingerprint cards were destroyed.</p> <p>Thus, as of August 28, 2017 (the date of the DOJ SAN contract for licensed attorneys) the only active attorneys whose fingerprint images the State Bar had in its possession were those attorneys who applied for admission after August 28, 2014 (approximately 1,500 active attorneys). The State Bar has since submitted these fingerprint cards to the DOJ for retention pursuant to the SAN contract. These active attorneys will be exempt from the fingerprinting requirement. Attorneys will be able to determine whether they are exempt through a link on their MyStateBar profile.</p> <p>There is no way for staff to receive criminal information from the DOJ for the approximately 245,000 other attorneys without new fingerprint images for these attorneys. The DOJ will not provide criminal record information without biometric identification.</p> <p>The DOJ will also not share fingerprint images or criminal record information between entities. Thus, if an attorney's fingerprint images are retained by the DOJ for a different purpose (such as employment background check or upon application for a different license), the DOJ will not run a background check using those images and provide the results to the State Bar. The DOJ will also not transfer the fingerprint images to either the State Bar or into the State Bar's SAN system.</p> <p>Notably, there are numerous other professions that require the re-submission of licensee fingerprints, despite the fact the licensee may have already submitted them. See e.g., 16 CCR § 1399.722 (requiring podiatrists to submit a full set of fingerprints to the DOJ if, "regardless of the date of initial licensure", "an electronic record of the submission of fingerprints no longer exists."); 16 CCR § 4120 (requiring applicants for renewal of occupational therapy license to submit fingerprints to the DOJ if fingerprints had not been previously submitted or for whom a record of submission of fingerprints no longer exists); 16 CCR § 1419 (same requirement for renewal of registered nurses). These regulations were adopted pursuant to statutes authorizing licensing boards to adopt regulations necessary to properly regulate their profession. See Bus. & Prof. Code §§ 4808, 2404, 1906, 2841.1, 4933, 4504, and 5010.</p>
4	Expensive: The rule imposes a harsh financial burden on attorneys by requiring them to pay full fingerprinting costs.	413	<p><u>Attorney Costs:</u> The State Bar estimates the total costs for fingerprinting to be approximately \$82 per active attorney (\$49 for the cost of the background check and approximately \$33 for the print furnishing costs). See Attachment 3 at p. 6. This is a one-time cost for the attorney (or the attorney's employer), and is a small fraction of the yearly costs attorneys are required to pay to maintain their licenses each year.</p> <p>Moreover, while there is a set cost for running the background check (the "processing costs"), the \$33 print furnishing cost is an estimate. "Print furnishing" is a term used for the process performed by the service center that physically takes fingerprint images and submits them to the</p>

	The rule will also cost the State Bar considerable money to implement, taking funds away from other valuable State Bar services.		<p>DOJ, using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents). A review of fingerprint servicing locations in the State of California (available at https://oag.ca.gov/fingerprints/locations) indicates that, depending on location, these services can be between \$5- \$20. For example, numerous Live Scan locations in Los Angeles county and almost every location in San Diego county charges between than \$10-15. Certain jail facilities also provide free fingerprint services.</p> <p>Lastly, the proposed rule provides that licensed attorneys who have been granted certain reductions in their annual membership fees based on financial hardship will not be required to pay the \$49 processing fee.</p> <p><u>State Bar Costs:</u> The State Bar anticipates some increased expenses in implementing the new rule, primarily in the form of increased staffed needs. See <i>generally</i>, Attachment 3. However, the State Bar is acting pursuant to the Legislature and Court's recognition that these expenses are outweighed by public protection considerations.</p>
5	The State Bar should pay for all fingerprinting costs: Since re-fingerprinting is only necessary due to the State Bar's failure to act in accordance with statutory requirements, the State Bar should bear all costs of re-fingerprinting.	362	<p>If the State Bar were to pay all costs of attorney fingerprinting, it would cost the State Bar approximately \$15.51 million, not including the costs the State Bar will incur for increased staffing and other operational and administrative costs. Staff has already detailed the available fund balances for these costs in the November 3, 2017, board Agenda Item. See Attachment 3, at p. 12. The State Bar does not have adequate resources available in any fund to cover these staggering costs.</p> <p>Moreover, requiring licensees to pay the cost of submitting or re-submitting fingerprints to the DOJ, including in circumstances where fingerprints were previously submitted, is in line with the procedures of various other licensing entities. See 16 CCR § 2010.05 (requiring veterinarians to submit fingerprints for the purpose of conducting criminal records searches "if an electronic record of the submission of fingerprints no longer exists or was never created" and that "the licensee shall pay any costs for furnishing the fingerprints and conducting the searches."); 16 CCR § 1132 (dental hygienists); 16 CCR § 2517.5 (vocational nurses); 16 CCR § 1399.419.2 (acupuncturists); 16 CCR § 2575.5 (psychiatric technicians); 16 CCR § 37.5 (accountants).</p>
6	Unconstitutional: The rule violates a number of constitutional rights, including the 4th, 5th, and 14th amendments.	60	This rule is a valid exercise of the State's regulation of the legal profession.
7	Privacy: The rule constitutes an invasion of	278	This rule is a valid exercise of the State's regulation of the legal profession.

	privacy.		
8	<p>Security: Commenters expressed concerns regarding the fact the State Bar and the government will have unfettered access to their fingerprint images and other confidential information.</p> <p>Many expressed specific concern that the <i>federal</i> government would be retaining or having access to their fingerprint images.</p>	42	<p>As an initial matter, these concerns apply not only to the proposed rule, but to Bus. & Prof. Code § 6054 generally. This statute was promulgated decades ago, and has always mandated the fingerprinting of applicants for purposes of obtaining criminal information from the state and federal government. In other words, applicant fingerprints have been sent to both the DOJ and the FBI for years.</p> <p><u>Security of Fingerprint images:</u> The State Bar will not be retaining any fingerprint images. Rather, fingerprints submitted via Live Scan will be sent directly to the DOJ for retention and the State Bar will never receive a copy. While fingerprints submitted using a hard copy fingerprint card will be sent to the State Bar for transmittal to the DOJ, the State Bar will immediately destroy any copies of the fingerprint card once it receives criminal information back from the DOJ.</p> <p>While the DOJ will submit all fingerprint images to the FBI for a federal background check, no fingerprint imaging information will be kept by the FBI. The only entity retaining the images will be the DOJ.</p> <p><u>Security of CORI and SAN:</u> If the rule is promulgated, the State Bar will be receiving back confidential criminal offender record information ("CORI") from the DOJ and FBI, and will also be receiving SAN for applicants and attorneys. The State Bar has been regularly receiving CORI regarding applicants for decades. The only change is that the State Bar will now be receiving SAN for applicants and attorneys, which will increase the volume of criminal information it receives.</p> <p>The State Bar continues to be governed by DOJ rules and regulations pertaining to the security and destruction of CORI information. Staff is also working on updated security policies and procedures, which will be made publicly available.</p> <p>Further, improper dissemination of confidential criminal information, by the State Bar, DOJ, or FBI, is governed by statute. Cal. Penal Code § 11076 ("Criminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute.").</p> <p>It is also a misdemeanor for agencies to improperly disseminate this information to unauthorized persons or entities. See Cal. Penal Code § 11142 ("Any person authorized by law to receive a record or information obtained from a record who knowingly furnishes the record or information to a person who is not authorized by law to receive the record or information is guilty of a misdemeanor").</p> <p>Staff recommends that there be an additional provision to the rule to clarify that all SAN information received by the State Bar shall be confidential and used for licensing purposes only.</p>
9	Current criminal	150	The unreliability of the State Bar's current reporting system is one of the main reasons this rule is necessary. Staff research suggests that, under

	<p>reporting requirements</p> <p>are sufficient: There are already criminal reporting requirements for prosecutors, courts, and attorneys, making the SAN system unnecessary.</p>		<p>the current reporting framework, there is significant underreporting by prosecutors, courts, and attorneys. See Attachment 3 at p. 11.</p>
10	<p>Alternative options: Commenters urged staff to consider alternative means to discover criminal history information, such as yearly oath cards by attorneys.</p>	59	<p>SAN allows the State Bar to have reliable and continuously updated access to an attorney's criminal information. There is no other alternative option that provides this information.</p>
11	<p>Burden for out- of-state attorneys: The language of the rule states that attorneys must submit fingerprint images to the DOJ via Live Scan technology, which is only available in California. Accordingly, attorneys stressed that this creates an unfair burden for out-of-state attorneys to travel to California to get</p>	81	<p>Attorneys residing outside of California are able to submit fingerprint images to the State Bar using a hard copy fingerprint card which can be completed at any fingerprint processing location within their state. The State Bar will then submit the fingerprint images to the DOJ and FBI.</p> <p>Accordingly, the rule should be changed to eliminate the language implying that attorneys must submit the fingerprint images directly to the DOJ.</p>

	fingerprinted.		
12	Burden on foreign attorneys: The rule creates an undue burden on attorneys residing overseas, as they may not have access to fingerprinting locations.	25	The rule should be modified to address active attorneys residing in foreign jurisdictions.
13	Exempt specific groups of attorneys: Commenters suggested that the rule should apply to only select groups of attorneys, including but not limited to, attorneys who have committed wrongdoing, newly licensed attorneys, or attorneys who have been practicing for many years.	61	The purpose of the rule is to effectively monitor the legal profession and to get information on all licensed attorneys. Limiting the rule to select subsets of attorneys would defeat the key purpose of the rule, which is to access criminal information that would not otherwise be known to the State Bar. Notably, the Legislature has not done so.
14	Increase in inactive attorneys: The rule will encourage attorneys to either remain inactive or go inactive.	8	There is always the possibility that an attorney will choose to go inactive rather than comply with the rules and regulations of the profession. That prospect, however, does not excuse compliance with the statute.
15	Unreliable: Commenters	20	No methods of identification are 100% accurate. That said, the Legislature has mandated fingerprinting and there are no other

	indicated that fingerprint information is not a reliable identifier. ³		alternatives that provide the type of data the State Bar is seeking. The identification is reliable enough that hundreds of agencies and employers utilize fingerprinting for licensing, certification and employment purposes.
16	Why now?: Commenters expressed curiosity as to what prompted this proposed rule.	30	As outlined in Attachment 3, the reason the rule is being proposed now is due to the recent statutory amendment to Bus. & Prof. Code § 6054, effective January 1, 2018. This statute was amended following the State Bar's discovery that it was not in compliance with the SAN contract requirement in place since 1989.
17	Overbroad: Commenters were concerned about the fact that State Bar will receive arrest information, which is not a reportable offense.	125	<p>A State Bar independent entity, distinct from the Office of Chief Trial Counsel ("OCTC"), will review arrest information when it is received by the State Bar. Only arrests that are determined to constitute a disciplinable offense will be forwarded to OCTC. OCTC will then conduct an investigation independent of the criminal justice system to determine whether to pursue disciplinary charges.</p> <p>The criminal justice system is distinct from the State Bar. The State Bar independently evaluates attorney conduct for purposes of regulation and public protection. Accordingly, certain arrests may be actionable if the arrest is for a disciplinable offense. See Bus. & Prof. Code § 6106 ("The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension.") (emphasis added).</p>
18	Inactive attorneys should be treated the same as active attorneys: Commenters indicated that ALL attorneys should be required to be re-fingerprinted.	4	Inactive attorneys are not able to practice law in the State of California. Accordingly, the public protection concerns are lessened.

³ The concern that some individuals are unable to be fingerprinted is addressed in a different category (#24)

19	<p>B&P Code § 6054 Doesn't Require re-fingerprinting: Bus. & Prof.</p> <p>Code 6054, as recently amended by SB 36, authorizes, but does not obligate, the State Bar to re-fingerprint active attorneys.</p>	30	The Court's October 20, 2017 letter directs the State Bar to require the fingerprinting of all active attorneys. See Attachment 3, at p. 2, 11.
20	<p>Exempt attorneys who applied for admission to the State Bar prior to January 1, 1989: Prior to January 1, 1989, the State Bar had no obligation to have applicant fingerprints be retained by the DOJ.</p> <p>Accordingly, commenters felt that attorneys who applied for admission prior to this date should be exempt from the rule.</p>	4	For public protection purposes, the statute and the rule apply to all licensed attorneys, not just those attorneys who applied after the original requirement was promulgated.
21	<p>Timing is unclear: It is not clear if this is a one time or an ongoing requirement.</p>	40	The rule provides for all active attorneys to be fingerprinted on or before December 1, 2019. This is a one-time requirement. However, there may be circumstances where re-fingerprinting is needed at a later time. For instance, the State Bar is required to notify the DOJ if individuals are no longer attorneys such that the DOJ can destroy their fingerprints and cease providing SAN. See Cal. Penal Code § 11105.2(d). Thus, if an attorney is disbarred, or resigns, and then later applies for re-admission,

			<p>he will need to be re-fingerprinted.</p> <p>The rule should be clarified to provide the State Bar with the ongoing authority to re-fingerprint in these situations, or in other cases in which it is discovered that for some reason the State Bar is no longer receiving SAN for a specific attorney. Moreover, many attorneys will also change from inactive to active status after December 1, 2019.</p>
22	Implementation: Commenters expressed concern that the rule lacks clarity on process and procedures for the re-fingerprinting processes.	15	Implementation procedures, instructions, and a Frequently Asked Question document will be issued by the State Bar upon Court adoption of the rule.
23	Disability concerns: Commenters expressed concern for the fact that the rule does not provide exceptions for those attorneys whose fingerprints are unreadable, who are unable to provide fingerprints, or who do not have fingerprints because of a disability.	5	The proposed rule should be amended to incorporate disability protections.
24	Extend fee processing waivers: A small number of commenters suggested that processing fee waivers should be extended to	4	The proposed rule should be amended to provide the Board the authority to implement fingerprinting fee waivers. This will allow the Board to develop its own policies regarding what groups of attorneys should be granted fee waivers.

	attorneys who have received fee scaling under State Bar Rule 2.15(B) (attorneys who work for certain qualified legal services). The commenters stressed the proposed rule would impose tremendous costs to underfunded qualified legal service providers and support programs.		
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In addition to the proposed rule changes, noted above, stemming from an analysis of comments received, staff has also identified an additional modification to clarify application of the rule to attorneys practicing in California under the Court’s Special Admissions rules. See Division 4 of the California Rule of Court (“Appearances and Practice by Individuals Who are Not Members of the State of California”).

Although many Special Admission categories require a State Bar moral character determination, attorneys applying for authorization to practice under these provisions do not apply for general admission to the State Bar. *Id.* The legislative intent of the 1989 amendment to Bus. & Prof. Code § 6054 was for the State Bar to retain fingerprints of applicants for admission to the State Bar such that the State Bar could receive arrest notification for its licensees. Since individuals in these Special Admissions categories are not State Bar licensees, they do not need to be re-fingerprinted.

Lastly, as noted above, there were a small number of comments received that favor the re-fingerprinting rule.⁴ These include:

- “I am a CA licensed attorney since 2001. I am also a domestic violence survivor and the founder of SOAR for Justice. My ex-spouse, also a CA attorney, was abusive towards me for 10 years. I obtained a domestic violence restraining order in against him in San Diego County and this did not impact his ability to practice law. If he had been required to re-fingerprint, however, the state bar may have learned about his moral turpitude. As a result of the violence, I have relocated with my child to Massachusetts to escape my abuser. He continues to

⁴ These comments are provided as submitted.

practice law in San Diego. I believe the state bar should include the existence of a domestic violence restraining order as a basis for disbarment.”

- “I think this is a good idea because many attorneys with drug and alcohol problems seem to be "under the radar" and knowing if there has been a relapse is important for the public interest. In addition, those with mental health disabilities, which might include elder attorneys who should be retiring, could be detained for driving recklessly, for example.”
- “I think anything that encourages law abiding behavior and maintains the integrity of the law profession is a good move. There are already too many attorneys, many with questionable judgment, as evidenced by their criminal convictions.”
- “I believe this change is long overdue and will help ensure the integrity of the attorney ranks. It is consistent with the licensing schemes for other professions.”
- “This a rule is long overdue [sic], criminal behavior should not be tolerated when your [sic] an Officer of the Court. Being able to identify when a member is on a criminal lifestyle serves the public interest as to prevent that behavior from escalating.”
- “The benefits of required fingerprinting and criminal history verification are numerous and compelling. Fingerprinting permits positive identification of attorneys with relevant convictions, thus enabling the Bar to exercise appropriate discretion— a valuable disciplinary tool that the Bar has been lacking for the past 30 years.

As attorneys, we owe a duty to the state of California to ensure that members of our profession are adhering to the law of the land. We cannot stand for a system that would deprive the public of this critically important benefit because we don't think we should have to pay for it. And it would equally harm the public if the Bar were forced to divert existing funds away from its work disciplining unethical and incompetent attorneys in order to pay for the costs of submitting existing attorneys' fingerprints to the Department of Justice.

While it is extremely unfortunate that we attorneys should have to pay again to submit our fingerprints due to the Bar's own lack of compliance with the law, it is the right thing to do to protect the people of California. “

RECOMMENDATION

State Bar Rule 1.10 mandates that all rules proposed by the State Bar to the Court be circulated for public comment. Pursuant to this rule, substantive amendments to proposed rules must also be circulated for public comment. See Rule 1.10 (B)(2) (2). As staff recommends substantive amendments to the rule, an additional public comment period is required.

Attachment 1 provides the clean text of the revised proposed rule. Attachment 2 provides the redline/strikeout version of the rule, showing changes to the proposed rule from the rule issued for the 45-day public comment period.

PROPOSED BOARD RESOLUTION

RESOLVED, that the Board of Trustees authorizes staff to make available for a 30-day public comment period, the amended proposed rule to the California Supreme Court included as Attachment 1 to this Agenda Item.

ATTACHMENT(S) LIST

Attachment 1. Clean Text of Proposed Amended Rule

Attachment 2. Redline Text of Proposed Amended Rule Showing Changes to the Draft submitted for public comment

Attachment 3. November 17, 2017 Agenda Item requesting public comment authorization

Attachment 4. Full Text of Public Comments – Available at http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/Public_Comments_Attachment_4_Comments-received.pdf

PART TWO

PLANNING AND PREPARATION FOR RE-FINGERPRINTING ACTIVE, LICENSED ATTORNEYS: BACKGROUND

In preparation for the implementation of a new Rule of Court requiring the re-fingerprinting of active, licensed attorneys, a multi-divisional team of Bar staff has been working to develop the technology, policies, and procedures necessary to implement the policy by the deadline of December 1, 2019, established by the Board of Trustees in its proposed rule. Part Two of this report provides a detailed overview of the work completed to date, proposed processes for reviewing criminal records of licensed attorneys, an implementation schedule, and the remaining steps necessary to successfully implement this new Rule of Court.

DISCUSSION

In June 2017, the Bar entered into a contract with the DOJ to receive Subsequent Arrest Notification (SAN) for all *applicants* to the Bar whose fingerprints were processed after July 1, 2017. In August, the Bar entered into a contract with the California State Department of Justice (DOJ) to allow for the receipt of SAN on *attorneys*.

DOJ policies, however, do not allow for agencies such as the Bar to receive SAN on anyone who has not been identified through fingerprinting. And, because the Bar had not previously entered into a contract with DOJ to receive SAN, DOJ did not retain fingerprint records of attorneys whose fingerprints were processed prior to July 1, 2017. As a result, it is not possible for the Bar to receive SAN information on any attorney's fingerprinted prior to July 1, 2017 unless the attorney is re-fingerprinted.

Assuming that the Supreme Court adopts a new Rule of Court to require the re-fingerprinting of attorneys in California, the receipt of SAN from the DOJ will involve two distinct phases of work. The initial phase of work will involve the re-fingerprinting approximately 190,000 active attorneys in California and processing of the results of those fingerprints. The subsequent phase will involve the "maintenance" of the new work created by the receipt of SAN information.

In addition to the different phases of work required to implement this rule, the receipt of criminal history and SAN information will have a distinct impact upon different divisions of the Bar:

- Applicants for admission to the Bar whose fingerprints were processed after July 1, 2017, are already enrolled in the SAN system. As a result, the Office of Admissions has already begun adapting its business processes and procedures to address the receipt of this information on applicants;
- The Office of Attorney Regulation and Consumer Resources (ARCR) has not yet been affected but will play a central role in the implementation of the new Rule. ARCR records will be used for notifying attorneys of their obligations under the rule, sending reminders, posting information on attorneys' My State Bar Profile pages on the Bar's web site, tracking compliance, and, if necessary, sanctioning attorneys for non-compliance;
- The Office of the Chief Trial Counsel (OCTC), Office of Probation, and State Bar Court can expect an increase in the volume of work related to SAN sent by the DOJ. But the expectation is that the implementation of a new rule on fingerprinting will not result in significant operational changes to these components of the discipline system;

- Information Technology (IT) staff have been central to all of the work to date and will continue to play a critical role throughout the implementation. The IT team working on this project has established and tested new channels for the transmission of data from the DOJ; they have built new interfaces for reviewing DOJ data electronically and comparing the information with State Bar records; they have created automated routines for the processing of information and population of new fields in the records of attorneys to track compliance; and, they will continue to work closely with all Bar staff on developing and implementing the technology requirements of this policy;
- The Office of Research and Institutional Accountability (ORIA) is working as the project lead, coordinating the work of different divisions across the Bar. ORIA will remain heavily involved throughout the implementation phase of the project. Depending on how SAN information is routed following implementation, ORIA's work may end, or the unit may continue to play a supportive role to OCTC once the Bar has completed the re-fingerprinting of attorneys.

The following discussion looks first at data transfer and the process of matching and validating records, focusing on those aspects of the process that are the same for applicants to the Bar and for licensed attorneys. This section includes a discussion of new processes already adopted in the Office of Admissions and the proposed processes for reviewing criminal histories of attorneys and routing this information to OCTC.

After that, the report looks at aspects of the process that will differ between the Office of Admissions and ORIA. This section provides information on proposed guidelines that will be followed for routing information on the criminal histories of applicants and licensed attorneys.

The section after that proposes a timeline for implementation of the requirement including a single period for compliance of all attorneys followed by a warning period, and two successive periods of graduated sanctions for failure to comply. This section also looks at the question of active, out-of-state attorneys, and active attorneys who reside outside of the country.

The remainder of the report then discusses the discontinuation of SAN for applicants and attorneys when their statuses change (applications that are withdrawn and licensed attorneys who are disbarred, resign, or are deceased); data security, and; the final phase of work, maintenance of the receipt of SAN information once the implementation phase of the Rule is completed.

DATA TRANSFER, MATCHING AND VALIDATION OF RECORDS

After entering into the contract with the DOJ to receive SAN information on licensed attorneys, Bar IT staff began working with the DOJ to establish protocols for secure data transfer of information from the DOJ. The Bar already has a secure, electronic data transfer process in place to receive background check information from the DOJ for *applicants* to the Bar and, in certain respects, the creation of a new, secure channel to receive SAN information on licensed attorneys runs parallel to the existing process.

There are, however, important differences in the two processes. And, the development of new processes to receive SAN for licensed attorneys has already resulted in the creation of new tools and streamlined processes that are being used in the Office of Admissions to review background checks sent as part of an applicant's moral character evaluation.

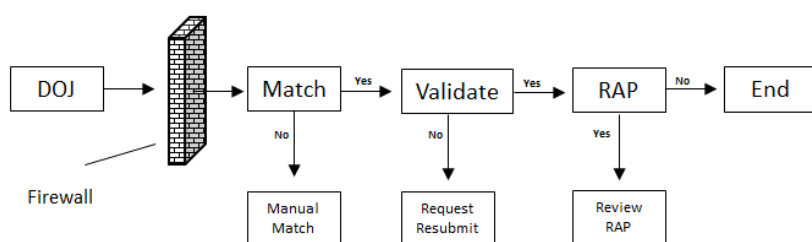
Receipt of Criminal History Information – Processes that Apply to Applicants and Attorneys

Enrolment into the SAN system begins with a background check. The submission of fingerprints by an applicant or attorney results in the production of a report on the individual's entire criminal history (a Record of Arrest and Prosecution, RAP) that is transmitted to the Bar.⁵

IT staff developed a new, automated process for the matching of records when the Bar receives the initial background check, shown in Figure 1, below. The vast majority of cases will follow the path of the horizontal arrows, which is entirely automated and defined by the following key actions.

- DOJ - the results of the background check are sent from DOJ and pass through a secure fire-wall onto a State Bar server;
- Match - the identity of the subject of the background check is matched against Bar records of applicants and attorneys and moved forward when the identity is established;
- Validate - the DOJ indicates that it was able to process the fingerprints (it was not rejected due to un-readable prints) and moves forward again;
- RAP - the DOJ indicates that it has no record of arrest and prosecution for the subject of the check and the process ends.

Figure 1 – Initial Phase of Data Receipt – No Criminal Record



During this initial phase of receipt and processing a number of additional automated procedures take place, not pictured in Figure 1.

- Match – when an attorney's or applicant's fingerprints are matched, a "flag" will be created on the attorney or applicant's record indicating compliance with the fingerprinting requirement;
- Validate – when an attorney or applicant's fingerprints cannot be read by the DOJ, the information moves into a queue for further processing to alert the attorney or applicant that fingerprints must be resubmitted.

Because this initial phase of matching and validating fingerprints is common to the review of background checks for both applicants and attorneys, the Office of Admissions is already using

⁵ All background checks will include both a California state-specific check, run by the DOJ, and an FBI check which runs against Federal criminal databases including criminal history data reported by other states. The data transmission for both checks runs through the California State DOJ, and the processes described here apply to both of these checks. For the sake of clarity, the different background checks will be singled out only when there is a difference in the process for handling the two types of checks.

the new technology developed by the Bar's IT Office. As a result of this work, the process has already been improved in the Office of Admissions.

Previously, Office of Admissions staff assigned to the Moral Character evaluation would print hard copies of the report transmitted by the DOJ and compare the information contained in those reports to the records of applicants to establish a match. The new process developed by the Bar's IT team conducts an automated match and completes the processing for applicants under three conditions: their application information is identical to DOJ records; their fingerprints were readable, and their RAP indicates no criminal history (the horizontal path defined in Figure 1).

When records do *not* match – for example, because of a transposed digit in a Social Security number or birthdate – the DOJ report is placed in a work queue that integrates with the records of the Office of Admissions. Using the new interface developed by IT, Office of Admissions staff can now review the unmatched record on the same screen as applicant data and, where appropriate, complete a manual matching of records entirely within the electronic interface.⁶

Review of Criminal History Information – Processes that Will Differ for Applicants and Attorneys
When the result of the criminal background check is positive – that is, when there is a criminal history for the applicant or attorney – the work flow requires manual intervention. This flow is depicted in Figure 1 by the horizontal path up until RAP at which point it follows the arrow down to “Review RAP.” At this point, the processes followed by the Office of Admissions will diverge from the processes followed by the ORIA.

Office of Admissions Review of Applicants' Criminal History

In the Office of Admissions, the handling of criminal history information depends on the stage of case processing for the application. Criminal history information is reviewed to determine how to route the information: if the applicant is in the pre-processing phase, the results are submitted to the assigned pre-processing clerk; if the applicant's case has already been assigned to a moral character analyst at the time that criminal history information is discovered, the findings are submitted to the corresponding moral character analyst.

In the event that a criminal history or subsequent arrest information is received for an applicant who has since become a licensed attorney, the record will be routed to ORIA. All arrest information obtained during a background check or as a result of a subsequent arrest will be evaluated against applicant reports and the applicant file in its entirety. The information will be assessed to determine first whether the applicant already reported the incident and, if so, whether the account matches the report received by the Office of Admissions. If the incident was already reported and matches the report received by the Office of Admissions, then no additional processing is required.

In cases where an applicant did not already report relevant criminal history information to the Office of Admissions, the information will be considered as part of the moral character

⁶ In addition to match failures that result from simple errors in data entry or the transposition of numbers in key identifiers, the Office of Admissions also receives criminal history information on applicants who are not yet in the system at all because fingerprints were submitted prior to the submission of other application materials. The Office of Admissions holds onto these applications for three months before destroying those results and alerting the DOJ that the agency is no longer interested in arrest information for this individual.

determination. The applicant's candor, severity of the arrest, charges, or conviction, and its impact, rehabilitation (or potential for rehabilitation) and accountability are other factors considered in the moral character determination. Cases with complex circumstances or requiring input from the applicant, are submitted to the Committee of Bar Examiner's Moral Character subcommittee for an informal conference. At the conclusion of each informal conference, subcommittee members are required to make a positive or negative determination, or to "abey" the case. A positive determination clears the case. A negative determination leads to a denial of the application but allows the applicant to wait two years before re-applying or allows the applicant to appeal through the State Bar Court. An abeyance determination grants the applicant time to participate in rehabilitation.

Office of Research & Institutional Accountability Review of Attorneys' Criminal History

Attorney background checks that contain criminal history information will be retrieved by staff in ORIA from a secure terminal. ORIA staff will follow a number of decision rules regarding the information to determine whether to forward the information to the Office of the Chief Trial Counsel.

The first decision rule for evaluating criminal record information has to do with the date of arrest, charge, or conviction on the record. The remaining questions flow from that date as shown in Figure 2, below.

Figure 2 – Simplified Decision Rules for Routing of Criminal Record Information

- Did the date of the criminal history information precede the attorney's admission to the Bar?
 - If "yes":
 - Was the criminal history information known to the Office of Admissions and considered during the attorney's moral character evaluation?
 - If "yes", then the record is destroyed and no further action is taken;
 - If "no", then the record is transferred to OCTC for review.
 - If "no":
 - Was the criminal history information known to OCTC?
 - If "yes", then the record is destroyed and no further action is taken;
 - If "no", then the record is transferred to OCTC for review.

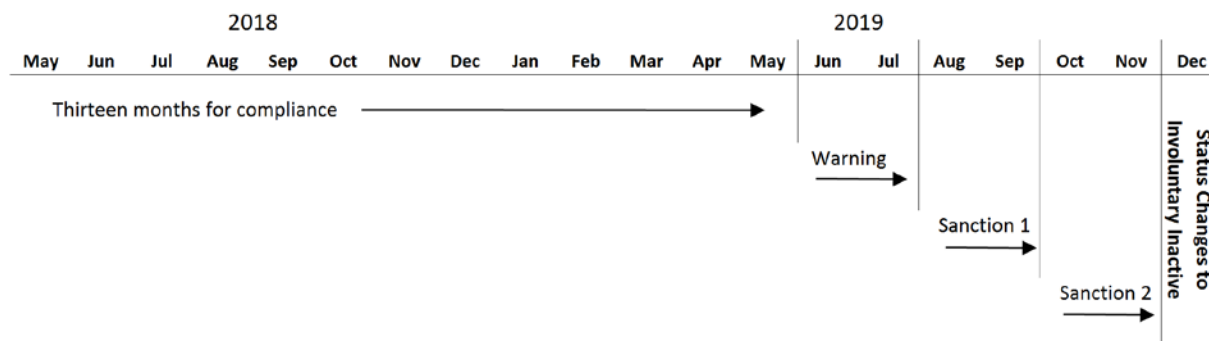
The actual decision rules for evaluating and acting on criminal history have additional nuances related to whether the information pertains to arrests, charges, or convictions, and the age and type of charge (misdemeanors or felonies). Attachment 5 provides a more detailed decision matrix and the guidelines that will be used to determine whether or not to forward a record to OCTC.

ENFORCEMENT OF REQUIREMENT FOR RE-FINGERPRINTING

The proposed rule requiring the re-fingerprinting of attorneys approved by the Board of Trustees directs the Bar to complete the re-fingerprinting of active attorneys by December 1, 2019 (Attachment 1). This relatively short time-frame for implementation will expedite the Bar's compliance with Business and Professions Code 6054 and suggests the need to establish a single compliance period for all active attorneys with frequent notification and graduated sanctions for failure to comply.

The exact time frames for implementation will depend on the date when a new rule, if approved, becomes effective. The phases through which notification and sanctions proceed, however, can be mapped out and are presented in Figure 3, below, under an assumption of an April 30 effective date for the new rule.

Figure 3 – Proposed Timeline and Phases for Implementation of Re-Fingerprinting



With an April 30 effective date, Figure 3 shows that a full 13 months could be established for compliance with the re-fingerprinting mandate followed by:

- a two-month warning period during which communication is more frequent and the consequences for failure to comply are emphasized more strongly;
- a two-month period during which active members who have not complied would be required to pay a limited monetary sanction for late compliance;
- a two-month period during which active members who have not complied would be required to pay a larger monetary sanction for late compliance.

Communications with licensed attorneys should be frequent and targeted. Although active attorneys will be the principal target of the communications, inactive attorneys and attorneys who are in statuses that would allow them to reactivate their licenses without re-fingerprinting will need to be alerted to the new requirements also.⁷ The requirements for reactivation of

⁷ Attorneys who are on Probation and complete a suspension without conditions other than the suspension are generally reactivated without any additional conditions. While these suspensions are relatively short and will mostly fall within the compliance period, there may be suspensions that conclude following the compliance period and will need to be addressed. Similarly, attorneys who are suspended and subject to additional conditions – such as the payment of restitution – may become eligible to have their licenses reactivated following compliance with these terms and outside of the compliance period.

licenses following a period of being in inactive status (or any other status from which an attorney could return to active status) should be changed to include the submission of fingerprints to the DOJ.

On-going tracking using the records of the Office of Attorney Regulation and Consumer Resources will allow for the delivery of e-mail notifications that only remind those attorneys whose fingerprints have not been received as of a specific date. These records can also be used to create a personalized notification on the My State Bar Profile pages on the Bar's web site, alerting attorneys if the Bar has not yet received their fingerprints or, conversely, notifying them that their fingerprints were received. The My State Bar Profile page will also be used to deliver the Live Scan form to attorneys with the required data-transmission codes that the DOJ uses to link fingerprints with the Bar.

Active out-of-state attorneys will pose a special challenge because of the potentially labor-intensive process for acquiring fingerprints from out-of-state attorneys. Currently the Office of Admissions mails blank fingerprint cards to out-of-state applicants to the Bar, then receives these cards from the applicants once their fingerprints have been taken, and transmits the cards to the DOJ. There are currently approximately 20,000 out-of-state attorneys in active status. Bar staff are communicating with the DOJ to explore options for fingerprinting out-of-state active attorneys that would avoid the multiple steps of communication and mailing involved in the process employed by the Office of Admissions for out-of-state applicants.⁸

DISCONTINUATION OF DATA TRANSMISSION FROM THE DOJ

The receipt of SAN information from DOJ creates an additional obligation for the State Bar: notification of the DOJ when SAN information on applicants and attorneys is no longer needed. The formal process for removing people from the SAN system is referred to as a "No Longer Interested" (NLI) notification. In the Office of Admissions, applicants will remain registered for the transmission of subsequent arrest data to the Bar until their application is abandoned, denied, expired or withdrawn either administratively or by the applicant. When an application has reached any of these stages, the applicant's name and identifying information will be added to an NLI file which will be submitted to the DOJ on a monthly basis.

For active attorneys, SAN will be discontinued when attorneys move out of either active or inactive status and into any one of three categories: disbarred, resigned, or deceased. Information technology staff are developing the automated routine that will track status changes, create a NLI list, and place a flag on the records of former attorneys to indicate that they have been removed from the SAN system.

DATA SECURITY

ORIA staff are currently reviewing Bar protocols regarding data security including access to secure terminals and assessing the adequacy of the number and location of "custodians of records" in different Offices of the Bar. Typically an agency establishes one or more custodians of records whose role is to ensure that all staff with access to criminal history information have signed documents attesting to their awareness of the confidentiality of criminal history

Additional requirements will need to be established to ensure that attorneys who may have been suspended during the compliance period are re-fingerprinted prior to becoming active again.

⁸ Another almost 2,000 active attorneys reside in foreign countries. Amendments to the proposed Rule of Court contained in Part One of this report address a process for dealing with these cases.

information and the criminal penalties associated with the unauthorized transmission of this information. Custodians of records need to be fingerprinted with SAN information on them routed to the DOJ.

MAINTENANCE OF SUBSEQUENT ARREST NOTIFICATIONS FOLLOWING IMPLEMENTATION

Direct Receipt of Subsequent Arrest Notification Information in OCTC

One of the key benefits of the role performed by ORIA in the implementation phase is to regulate the flow of information to OCTC to ensure that only relevant criminal history information is forwarded to OCTC. Relevance relates to whether the Office of Admissions or OCTC was already aware of the information *and* whether the information is covered under the statutes that govern the reporting of criminal history information (Business and Professions Code Sections 6068(o)(4), 6068(o)(5), 6101(a) and 6101(b)).

Following the implementation phase, it will no longer be necessary to screen criminal history information to determine whether the information was known to OCTC. It may, however, be useful to retain ORIA in a gatekeeper role to evaluate whether the information *should* be transmitted to OCTC. Whether ORIA should continue to play this role will depend on striking a balance between an attorney's privacy rights and the Bar's public protection obligation and should be discussed in more detail by the Board of Trustees.

Office of Admissions Subsequent Arrest Notification

As noted above, applicants will remain registered for receipt of subsequent arrest data until the application is abandoned, denied, expired or withdrawn (administrative withdrawal or applicant withdrawal). When an application has reached any of these stages, the DOJ will be notified that the State Bar "is no longer interested" (NLI) in this applicant. An NLI report will be generated on a monthly basis to ensure that the State Bar is no longer receiving information for applicants that are no longer pursuing licensing.

Applicants who are not admitted into the practice of law and whose applications remain active may be reported to the Office of Admissions through the SAN system. The Office of Admissions will need to establish policies for how to assess the information reported through the SAN system, whether to reopen moral character evaluations based on the information.

FISCAL/PERSONNEL IMPACT

Bar staff anticipate that implementation of a new rule mandating the re-fingerprinting of attorneys will carry with it significant fiscal and personnel impacts. These costs were estimated at \$.6 million in the budget submitted to the Board of Trustees on November 3, 2017, but will depend upon the volume of previously unknown criminal history information discovered during the re-fingerprinting of licensed attorneys. On-going costs will depend on the amount and type of contact with the criminal justice system reported through the SAN process that was previously missed through self-reporting and reporting by prosecuting attorneys and courts.

STRATEGIC PLAN GOALS & OBJECTIVES 2017-2022

Goal: 1. Successfully transition to the "new State Bar"—an agency focused on public protection, regulating the legal profession, and promoting access to justice.

Objective: Implementation of a new rule mandating the re-fingerprinting of attorneys so that the Bar receives SAN information from the DOJ will bring the Bar into compliance with its statutory

obligations under Business and Professions Code 6054. Moreover, the implementation of this rule will provide the Bar with more accurate and complete information on criminal activity of attorneys.

ATTACHMENT(S) LIST

Attachment 5. Draft Decision Rules for Handling Records of Arrest and Prosecution

ATTACHMENT 1

1. **Licensed Attorney Fingerprinting**

a) **Subsequent Arrest Notification:** The State Bar shall enter into a contract with the California Department of Justice for Subsequent Arrest Notification services for licensed active California attorneys, pursuant to Business and Professions Code section 6054.

(i) The State Bar is already receiving Subsequent Arrest Notification services for some attorneys. The State Bar will consider these attorneys as having already satisfied the fingerprinting requirement of this rule and are thereby exempt. The State Bar shall notify all attorneys to check their MyStateBar Profile for information as to whether they have been deemed to have already satisfied the requirement.

b) **Active Licensed Attorneys:** Each active licensed attorney, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.

c) **Inactive Licensed Attorneys:** Inactive licensed attorneys, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted prior to being placed on active status.

d) **Active Licensed Attorneys in Foreign Countries:** Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction that the attorney is physically located, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.

e) **Special Admissions:** This Rule only applies to attorneys of the State Bar. It does not apply to attorneys who are permitted to practice in the State of California pursuant to California Rule of Court Rules 9.40 through 9.48.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation that requires all active licensed attorneys required to be fingerprinted under section 1(b) to be fingerprinted by December 1, 2019.

The State Bar has ongoing authority to require re-fingerprinting after December 1, 2019 attorneys for whom it is not receiving subsequent arrest notification services and for attorneys transferring to inactive status

3. Information Obtained by Subsequent Arrest Notification; Limitations on Disclosure

Any information obtained by the State Bar through the Subsequent Arrest Notification System shall be Confidential and shall be used solely for State Bar licensing and regulatory purposes.

4. Fingerprint Submission and Processing Costs

Except as described in 4(a), all costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

a) The Board of Trustees of the State Bar must develop procedures for granting waivers of fingerprint processing costs for licensed attorneys with demonstrable financial hardship.

5. Attorneys Who are Physically Unable to be Fingerprinted

a) If the DOJ makes a determination pursuant to California Penal Code section 11105.7 that the attorney is presently unable to provide legible fingerprints, the attorney will have been deemed to have complied with the requirement of Section 1.

b) Attorneys may also submit notification to the State Bar directly through their MyStateBar profile that they are unable to submit fingerprints due to disability, illness, accident, or other circumstances beyond their control. The State Bar will evaluate the notification and may require additional evidence. If the State Bar determines that the attorney is unable to submit fingerprints based on the information provided, the attorney will have been deemed to have complied with the requirement of section 1(b).

c) This section shall only apply to those persons who are unable to supply legible fingerprints due to disability, illness, accident, or other circumstances beyond their control and does not apply to persons who are unable to provide fingerprints because of actions they have taken to avoid submitting their fingerprints.

ATTACHMENT 2

1. Licensed Attorney Fingerprinting

a) Subsequent Arrest Notification: The State Bar shall enter into a contract with the California Department of Justice for Subsequent Arrest Notification services for licensed active California attorneys, pursuant to Business and Professions Code section 6054.

(i) The State Bar is already receiving Subsequent Arrest Notification services for some attorneys. The State Bar will consider these attorneys as having already satisfied the fingerprinting requirement of this rule and are thereby exempt. The State Bar shall notify all attorneys to check their MyStateBar Profile for information as to whether they have been deemed to have already satisfied the requirement.

b) Active Licensed Attorneys: Each active licensed attorney, with the exception of those attorneys specifically exempt under subsection 1(a)(i), ~~of the State Bar for whom the State Bar does not currently have fingerprint images~~ shall, pursuant to the procedure identified by the State Bar, be fingerprinted ~~submit fingerprint images to the Department of Justice~~ for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.

~~Inactive licensed attorneys for whom the State Bar does not have fingerprint images must submit fingerprint images to the Department of Justice prior to seeking active status.~~

c) ~~The State Bar shall request from the Department of Justice subsequent arrest notification service for its active licensed attorneys, pursuant to Business and Professions Code section 6054.~~ **Inactive Licensed Attorneys:** Inactive licensed attorneys, with the exception of those attorneys specifically exempt under subsection 1(a)(i), shall, pursuant to the procedure identified by the State Bar, be fingerprinted prior to being placed on active status.

d) Active Licensed Attorneys in Foreign Countries: Active licensed attorneys who are residing outside the United States and required to submit fingerprints under this Rule should have their fingerprints taken by a licensed fingerprinting service agency and submit the hard copy fingerprint card to the State Bar. If fingerprinting services are not provided in the jurisdiction that the attorney is physically located, the attorney must notify the State Bar using a form available through the attorney's MyStateBar profile. Such attorney will be exempt from providing fingerprints until he or she returns to the United States, provided, that within 60 days of returning (even temporarily) to the United States, such attorney shall be fingerprinted.

e) Special Admissions: This Rule only applies to attorneys of the State Bar. It does not apply to attorneys who are permitted to practice in the State of California pursuant to California Rule of Court Rules 9.40 through 9.48.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation ~~of subsection (a)~~ that requires all active licensed attorneys ~~required for whom the State Bar does not have fingerprint images to be fingerprinted under section 1(b) submit fingerprints to the Department of Justice~~ by December 1, 2019.

The State Bar has ongoing authority to require re-fingerprinting after December 1, 2019 attorneys for whom it is not receiving subsequent arrest notification services and for attorneys transferring to inactive status.

3. Information Obtained by Subsequent Arrest Notification; Limitations on Disclosure

Any information obtained by the State Bar through the Subsequent Arrest Notification System shall be Confidential and shall be used solely for State Bar licensing and regulatory purposes.

3.4. Fingerprint Submission and Processing Costs

Except as described in 4(a), All costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

a) The Board of Trustees of the State Bar must develop procedures for granting waivers of fingerprint ~~will cover the DOJ and FBI processing costs for licensed attorneys with demonstrable financial hardship. who have been granted a fee scaling or fee waiver for annual membership fees pursuant to State Bar Rule 2.15(A) or 2.16(C)(3)(c). These attorneys will pay for all third party print furnishing costs.~~

5. Attorneys Who are Physically Unable to be Fingerprinted

a) If the DOJ makes a determination pursuant to California Penal Code section 11105.7 that the attorney is presently unable to provide legible fingerprints, the attorney will have been deemed to have complied with the requirement of Section 1.

b) Attorneys may also submit notification to the State Bar directly through their MyStateBar profile that they are unable to submit fingerprints due to disability, illness, accident, or other circumstances beyond their control. The State Bar will evaluate the notification and may require additional evidence. If the State Bar determines that the attorney is unable to submit fingerprints based on the information provided, the attorney will have been deemed to have complied with the requirement of section 1(b).

c) This section shall only apply to those persons who are unable to supply legible fingerprints due to disability, illness, accident, or other circumstances beyond their control and does not apply to persons who are unable to provide

fingerprints because of actions they have taken to avoid submitting their fingerprints.

ATTACHMENT 3

OPEN SESSION
BOT AGENDA ITEM NO. 701
NOVEMBER 2017

DATE: November 3, 2017

TO: Members, Board of Trustees

FROM: State Bar Staff

SUBJECT: Proposed California Rule of Court Regarding Fingerprinting of Active Licensed Attorneys – Request for Public Comment

EXECUTIVE SUMMARY

This agenda item requests the Board of Trustees to authorize a 45-day public comment period for a proposed court rule to implement a fingerprinting requirement for active licensed attorneys under the recent amendments to Business and Professions Code section¹ 6054, effective January 1, 2018. Pursuant to the California Supreme Court's recent directive, the proposed rule requires all active licensed attorneys to submit or resubmit fingerprints to the Department of Justice by a set deadline and to pay the fingerprint processing and furnishing costs in connection with such submissions.

BACKGROUND

On October 20, 2017, Tani G. Cantil-Sakauye, Chief Justice of California, sent a letter to State Bar President Michael Colantuono and Executive Director Leah Wilson, regarding Senate Bill ("SB") No. 36's recent amendment to section 6054 authorizing the State Bar of California ("State Bar") to require attorneys to submit or resubmit fingerprint records to the California Department of Justice ("DOJ") in order to receive subsequent arrest notification for these individuals. The Court's letter is Attachment 1. The full text of section 6054, as amended by SB 36, is as follows:

(a) State and local law enforcement and licensing bodies and departments, officers and employees thereof, and officials and attachés of the courts of this state shall cooperate with and give reasonable assistance and information, including the providing of state summary criminal history information and local summary criminal history information, to the State Bar of California or any authorized representative thereof, in connection with any investigation or proceeding within the jurisdiction of the State Bar of California, regarding the admission to the practice of law or discipline of attorneys or their reinstatement to the practice of law.

(b) The State Bar of California shall require that an applicant for admission or reinstatement to the practice of law in California, or may require a member to submit or resubmit fingerprints to the Department of Justice in order to establish

¹ Unless otherwise stated, all section citations are to the Business and Professions code.

the identity of the applicant and in order to determine whether the applicant or member has a record of criminal conviction in this state or in other states. The information obtained as a result of the fingerprinting of an applicant or member shall be limited to the official use of the State Bar in establishing the identity of the applicant and in determining the character and fitness of the applicant for admission or reinstatement, and in discovering prior and subsequent criminal arrests of an applicant, member, or applicant for reinstatement. The State Bar shall notify the Department of Justice about individuals who are no longer members and applicants who are denied admission to the State Bar within 30 days of any change in status of a member or denial of admission. All fingerprint records of applicants admitted or members reinstated, or provided by a member, shall be retained thereafter by the Department of Justice for the limited purpose of criminal arrest notification to the State Bar.

(c) The State Bar shall request from the Department of Justice subsequent arrest notification service, as provided pursuant to Section 11105.2 of the Penal Code, for applicants to, and members of, the State Bar.

(d) If required to be fingerprinted pursuant to this section, a member of the State Bar who fails to be fingerprinted may be enrolled as an inactive member pursuant to rules adopted by the board of trustees.

(e) The State Bar shall report to the Supreme Court and the Legislature by March 15, 2018, regarding its compliance with the requirements of this section.

While section 6054 authorizes the State Bar to require submission or resubmission of attorney fingerprints to the DOJ, it does not obligate the State Bar to do so. The statute is also silent in regard to how the State Bar may implement attorney fingerprinting requirements, including with respect to a compliance timeframe and who should bear the costs associated with the processing and furnishing of these submissions. The statute also removes language mandating that the State Bar bear costs associated with the processing of applicant fingerprints.

The Supreme Court's October 20, 2017, letter obligates the State Bar to require attorney submission of fingerprints to the DOJ. It states: "requiring fingerprints of all applicants and active members is a critical component of public protection and strengthens the State Bar's discipline system." See Attachment 1. In its letter, the Court directs the State Bar "to consider and present to the [C]ourt any proposed court rules that may be appropriate to facilitate implementation of the fingerprinting requirement for all State Bar applicants and all active attorney members." *Id.*

In connection with the statutory changes, State Bar staff has been re-evaluating its current policies and procedures for applicant fingerprinting, and determining what processes are necessary for the submission of active attorney fingerprints to the DOJ and the subsequent receipt of criminal information. This evaluation includes an analysis of anticipated operational impact on the State Bar, including a review of staffing needs. Accordingly, this agenda item provides the Board with an overview of these analyses and a proposed court rule requiring all active licensed attorneys² to submit or resubmit fingerprints to the DOJ. The proposed rule also includes a timeframe for compliance with this requirement and a requirement that licensed attorneys bear all costs associated with fingerprint submission.

² State Bar applicants are already required to be fingerprinted pursuant to section 6054.

Pursuant to State Bar Board Book Rule 1.10, staff recommends that the Board request a 45-day public comment period on the proposed rule.

DISCUSSION

I. The State Bar's Subsequent Arrest Notification Contracts with the DOJ

As reported to the Board earlier this year, staff determined that it was necessary for the State Bar to enter into a contract for Subsequent Arrest Notification ("SAN") in order to comply with section 6054's fingerprint retention requirements. Prior to SB 36, section 6054 required that only State Bar applicants be fingerprinted and that such fingerprint records "be retained thereafter for the limited purpose of criminal arrest notification." Although the State Bar was requiring applicants for admission to be fingerprinted, the State Bar had not entered into a contract for the DOJ to retain these fingerprints. As such, the State Bar was not receiving SANs for any applicant after admission to the State Bar.³

Upon realizing the error, the State Bar entered into a SAN contract with the DOJ on June 28, 2017, effective July 1, 2017 (the "Applicant Contract"). Attachment 2 is the Applicant Contract. Pursuant to the Applicant Contract, the DOJ is now retaining applicant fingerprint records in order to notify the State Bar of subsequent arrests of those individuals.

The State Bar subsequently entered into a second contract with the DOJ for active licensees (the "Licensee Contract"). Attachment 3 is the Licensee Contract.

Although the Licensee Contract currently provides for SAN services for all licensed attorneys, the DOJ is unable to provide arrest notification for the vast majority of this population. This is because fingerprint records previously submitted by licensed attorneys as part of their moral character application were not retained by the DOJ because no contract was previously in place permitting such retention.

As also previously explained to the Board, the State Bar has only retained fingerprint records of a small subset of applicants who submitted fingerprints using hard copy fingerprint cards within the past three years. Of these applicants, approximately 1,500 are now active licensed attorneys. Following the execution of the Licensee Contract, the State Bar submitted the fingerprint records of these attorneys to the DOJ⁴. Thus, pursuant to the Licensee Contract, the DOJ will provide SAN services for these attorneys. However, the only way for the State Bar to receive arrest notification for all other active licensed attorneys is for those individuals to submit new fingerprint records to the DOJ to be retained pursuant to the Licensee Contract.

³ The term "arrest notification" includes notification of both arrests and the dispositions thereof. See Cal Pen. Code § 11105.2(a).

⁴ The State Bar has also submitted the hard copy fingerprint cards of approximately 1,500 applicants whose applications are still pending, so that they can be retained pursuant to the Applicant Contract.

II. Operational Analysis

A. Fingerprint Processing and Subsequent Arrest Notification Review and Response Procedures

In order to handle the influx of criminal information that will flow from the State Bar's two contracts with the DOJ, staff has re-evaluated its current processes and created certain new procedures.

1. New Procedures Related to State Bar Applicants

Pursuant to the Applicant Contract, effective July 1, 2017, enrollment in the SAN system now occurs as a byproduct of the criminal background check run on all applicants to the State Bar. Thus, following an applicant's submission of fingerprints to the DOJ, the Office of Admissions ("Admissions") receives electronic notification through a secure File Transfer Protocol ("FTP"), indicating whether a criminal history for the applicant was found. When a criminal history is found, Admissions receives this information electronically through the same secure FTP. Admissions will continue to receive notification of any criminal information until the applicant is admitted to the State Bar. While it is not anticipated that a large number of applicants will pick up additional arrests, charges, or convictions during the limited amount of time that most applicants are in this status, there are applicants who spend years attempting to pass the bar exam and whose moral character evaluation will need to be reconsidered by Admissions when new information comes to light as a result of SAN. Admissions has yet to receive any SAN hits on applicants who were fingerprinted since July 1, 2017, and staff is working to develop guidelines governing the review of this information when it is eventually received.

Another process for Admissions to manage is the notification to the DOJ when an applicant is denied admission to the State Bar. The State Bar is obligated to notify the DOJ when an applicant is denied admission so that the DOJ can destroy those individuals' fingerprints. See Cal Pen Code § 11105.2(f); section 6054, as amended by SB 36. An applicant is denied admission to the State Bar if he or she has not been admitted to the State Bar within three years of submitting a moral character application, provided there is no approved extension. An applicant who fails the bar exam may retake the exam within this time period without needing to be re-fingerprinted each time he or she registers for the exam.

On October 3, 2017, the Committee of Bar Examiners approved an applicant fingerprint processing protocol requiring Admissions to inform the DOJ when SAN is no longer required for individual applicants whose positive moral character determination has expired, their application has been abandoned, or who are otherwise ineligible for admission. Admissions staff will review moral character applications monthly to determine which applicants have applications meeting these requirements. The names of those applicants will then be transmitted to the DOJ through a formal "No Longer Interested" notification form each month.

2. New Procedures Related to Currently Licensed Attorneys

To effectuate the submission of licensed attorney fingerprints to the DOJ and the receipt of SAN for licensed attorneys, staff plans to upload a pre-populated and individualized Live Scan form on each attorney's My State Bar Profile page. These forms will include essential information for appropriate fingerprint routing: a "Mail Code" and "Applicant Type" agreed upon by the DOJ and the State Bar.

After an attorney has submitted fingerprints through the Live Scan process using this pre-populated form, the DOJ will run both a California and a national (FBI) background check and transmit that data to the State Bar. Receipt of the information from the DOJ will trigger the automatic population of the State Bar's records and compliance database indicating that the attorney has complied with the fingerprinting requirement and is now registered in the SAN system. Background checks that contain criminal history information will be routed to a secure terminal in the Office of Research and Institutional Accountability ("ORIA"), where dedicated staff will use specified decision rules to determine what additional steps, if any, need to be taken.

These decision rules, which have not yet been finalized, will address two different groups of licensed attorneys:

a. *Attorneys whose criminal record preceded admission to the State Bar.* If the date of the criminal history information *preceded* the completion of the moral character determination, ORIA staff will research the case to determine if the information found in the criminal background check was already disclosed as part of the attorney's moral character application. If the information was already disclosed, then the criminal history record will be destroyed and no further action will be taken. If the information was *not* already disclosed, staff will forward the record to Admissions for further analysis to determine what action, if any, should be taken.

b. *Attorneys whose criminal record occurred after admission to the State Bar:* If the date of the criminal history information follows the attorney's admission to the State Bar, ORIA staff will research the case to determine if the information found in the criminal background check was already disclosed to the Office of Chief Trial Counsel ("OCTC"). If the information was already known to OCTC, then the criminal history record will be destroyed and no further action will be taken. If the information in the criminal history was *not* already known to OCTC, then ORIA staff will forward the record to OCTC for further analysis to determine what action, if any, should be taken.

It will also be necessary to remove attorneys from the SAN system when they transition to certain statuses. Similar to the process being developed in Admissions, staff is working to develop a monthly routine for identifying attorneys who permanently resign from the State Bar, are disbarred, or die in order to submit this information to the DOJ through the "No Longer Interested" form⁵.

B. Implementation Costs

The costs associated with the fingerprinting of active licensed attorneys are outlined below. The State Bar will also incur costs associated with the implementation of the above processes and procedures. Estimates of these costs are based on the number of applicants and active licensed attorneys shown below in Table 1.

⁵ Cal Pen Code § 11105.2(d) requires the State Bar to immediately notify the DOJ when a "license or certification is revoked" and "when [an] applicant may no longer renew or reinstate the license or certificate."

Table 1

Licensed Attorneys in California	
Active	189,167
Inactive	57,434
Average Annual Number of Moral Character Applications	
	7,807

1. Fingerprint Processing and Furnishing Costs

It costs \$32 for the DOJ to process fingerprint records and an additional \$17 for the FBI background check, for a total cost of \$49 per individual. See <https://oag.ca.gov/sites/all/files/agweb/pdfs/fingerprints/forms/fees.pdf>. Prior to the recent amendments to section 6054, “[A]ll costs of providing criminal history information to, and the processing of fingerprints for, the State Bar, except for print furnishing and encoding, as required by this section, shall be borne by the State Bar.” SB 36 removes this language from section 6054, leaving the statute silent as to the responsibility for fingerprinting costs for applicants and licensed attorneys.

Applying the costs of fingerprint processing to all active licensed attorneys in California would result in a cost of approximately \$9.27 million. See Table 2.

Table 2

Cost of Enrolling Active Attorneys in SAN System	
DOJ & FBI Background Checks (per attorney)	\$49
Costs for 189,167 Active Attorneys	\$9,269,183

In addition the costs for processing, there is a cost for the actual fingerprint “furnishing.” This is a term used for the process performed by the service center that physically takes fingerprint images and submits them to the DOJ, using either Live Scan technology (California residents) or hard copy fingerprint cards (out-of-state residents). Historically, applicants have been required to pay these costs.

A review of fingerprint servicing locations in the State of California indicates that, depending on location, these services range in cost from \$5 through \$100 with an average cost of \$33. See <https://oag.ca.gov/fingerprints/locations> (listing service locations by county and the costs charged at each location). While many sheriff and police departments offer these services for \$5 (for example, the Lassen County Sheriff’s Department and Mariposa County Sheriff’s Department), many other departments charge much higher amounts. For example, the Richmond Police Department charges \$59, the Pinole Police Department charges \$50, and the Contra Costa Sheriff’s Department charges \$35. Certain jail facilities, such as the Mono County Jail, provide free fingerprint services.

Using the average cost of \$33 per fingerprint, the total cost of fingerprint furnishing for licensed attorneys is \$6.24 million dollars. See Table 3.

Table 3

Cost of Fingerprint Furnishing

Fingerprint "Furnishing" Cost (average per attorney)	\$33
Total Cost for Fingerprinting 189,167 Active Attorneys	\$6,242,511

Combined, the total cost of fingerprint furnishing plus the cost of conducting DOJ and FBI background checks on all active licensed attorneys in the State of California is approximately \$15.51 million. As discussed in more detail below, staff proposes that a court rule mandate that licensed attorneys bear these costs.

2. Anticipated Staffing Needs

While the costs of background checks and fingerprint furnishing are straightforward, calculating the staffing needs for implementing this policy requires additional information, much of which needs to be estimated. The rate at which attorneys are actually charged and convicted of crimes, the number of these cases that have gone un-reported, and the severity of the crimes are all unknown. Nor is it known how many attorneys will fail to comply with a fingerprinting requirement, need their status changed for such failure to comply, will contact the State Bar to inquire about the policy, or will request an extension or other accommodation.

Attachment 5 provides detailed lists of the functions and tasks that staff anticipate will need to be undertaken and the number of anticipated additional positions. Rather than calculating a single estimate, a range including a low, medium, and high estimate is provided for each of nine departments of the State Bar that will be impacted by this policy.

The detailed task and time estimates in Attachment 5 suggest a need for new staff that could be as few as 9 Full Time Equivalent (FTE) staff on the low end, and as many as 29 FTE on the high end. A number of the key parameters used to generate these estimates are summarized immediately below:

- The relevant number of charges and convictions for calculating new workload is not the total but, rather, the number of *previously undisclosed* criminal charges and convictions, i.e., *net* of those already reported;
- The rate of involvement in the criminal justice system for attorneys is assumed to be:
 - greater than current rate of criminal complaints in the State Bar's discipline system (.00122);
 - less than the rate of arrests for the general adult population in California (.042); and
 - greater than the rate for physicians (.00303)⁶, in part because attorneys experience alcohol dependence at a rate over twice that of physicians.⁷
- For initial implementation, the *annual* arrest rate needs to be multiplied by a factor reflecting the years of criminal activity that has gone un-reported. Approximately twenty seven (27) years have lapsed since the legislation mandating SAN. 27 is used as the

⁶ This is based on reporting by the Medical Board of California.

⁷ See Patrick R. Krill, JD, LLM, Ryan Johnson, MA, and Linda Albert, MSSW, "The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys," *Journal of Addiction Medicine*, Volume 10, Number 1, January/February 2016.

multiplier for the high-end estimates of the number of arrest records that will need to be reviewed; 10 is used as the multiplier for the low-end estimates, and 20 is used as the multiplier for the middle-range estimates. On an ongoing basis, this multiplier will not be necessary.

- Not all attorneys will come into the system at the same time. If the policy is implemented over two years, all of the annual estimates need to be cut in half to account for the introduction into the system of half of the attorney population each year.

The implications of these assumptions are as follows:

- At twice the rate of arrests for physicians (.00606), the annual number of arrests for half of the attorney population (95,000) is 576;
- Subtracting the number of criminal conviction cases reported in 2016 (232), the *net* number of annual arrests for half of the attorney population is 344; and
- Estimating that over the last 27 years some proportion of the new arrests are those of attorneys who had already been arrested previously, the low-end estimate of arrest records that will need to be reviewed is 3,437, the middle-range estimate is 6,874, and the high-end estimate is 9,280.

Table 4

Estimated Staffing Need by State Bar Department (Full Time Equivalent Staff – FTE)	Low	Medium	High
Office of the Chief Trial Counsel	3.95	7.85	10.58
State Bar Court	0.58	1.11	1.48
Office of Probation	1.64	3.23	4.34
Office of Admissions	0.35	0.64	0.85
Attorney Regulation and Consumer Resources ⁸	0.32	0.57	1.08
Call Center	0.31	0.57	1.10
Information Technology (fixed estimate, no range)	0.76	0.76	0.76
Office of General Counsel	0.70	2.65	6.27
Office of Research & Institutional Accountability	0.81	1.56	2.09
Totals	9.42	18.94	28.55

Given the uncertainty inherent in many of the parameters that are necessary for estimating the workload, State Bar staff proposes adding nine FTE, consistent with the low end of the range, with the specific allocation to be determined at a later date and the possibility of revisiting the need for staff as implementation moves forward.⁹

⁸ Formerly known as Member Records and Compliance

⁹ The 2018 budget only accounts for four FTE. This is due to a combination of financial constraints, the fact staff anticipates that the workload will grow over time, and the assumption that a conservative approach can be modified over time.

In addition to the detailed worksheets provided in Attachment 5, below is a narrative summary of the major functions for which additional resources will be needed in different departments of the State Bar.

- Additional Information Technology resources to:
 - finalize the design of, build, and maintain the new interface for the secure FTP between the DOJ and the State Bar;
 - re-design the interface between databases in Admissions and those in Attorney Regulation and Consumer Resources, and to provide resources to attorneys through their My State Bar Profile web page;
 - develop processes and maintain the system for re-routing SAN notifications from Admissions to ORIA when applicants to the State Bar become attorneys; and
 - develop new fields, codes, and data transfer routines for State Bar records on attorneys documenting compliance with the fingerprint requirements and the registration of licensed attorneys in the SAN system;
- Additional resources in ORIA to review background checks and route results to the appropriate department;
- Additional resources in Attorney Regulation and Consumer Resources to implement the notification to licensed attorneys of the new policy, respond to correspondence regarding the policy, develop and implement a system of reminder notifications, implement administrative sanctions for attorneys who fail to comply, release the sanctions when compliance is completed, and compile reports of attorneys who resign, are disbarred or die, for transmission to the DOJ to remove from the SAN system;
- Additional resources in Admissions to review background checks that contain information that licensed attorneys failed to disclose on their moral character application and to compile names of applicants whose positive moral character determination has expired, their application has been abandoned, or who are otherwise ineligible for admission, for transmission to the DOJ to remove from the SAN system;
- Additional resources in OCTC to review background checks that contain criminal charge or conviction information not previously disclosed by licensed attorneys or reported by either superior courts or prosecuting attorneys and to prosecute in appropriate cases;
- Additional resources for the State Bar Court to adjudicate cases that OCTC pursues related to criminal charges and convictions uncovered through the re-fingerprinting process and SAN system;
- Additional resources for the Office of Probation to monitor compliance with the terms of probation imposed upon attorneys who failed to disclose criminal histories; and,
- Additional resources for the Office of General Counsel for any legal work associated with the implementation of the fingerprinting requirement.

III. Proposed California Supreme Court Rule

A. Language of Proposed Rule

1. Licensed Attorney Fingerprinting

Each active licensed attorney of the State Bar for whom the State Bar does not currently have fingerprint images shall, pursuant to the procedure identified by the State Bar, submit fingerprint images to the Department of Justice for the purpose of obtaining criminal offender record information regarding state and federal level convictions and arrests.¹⁰ Inactive licensed attorneys for whom the State Bar does not have fingerprint images must submit fingerprint images to the Department of Justice prior to seeking active status.

The State Bar shall request from the Department of Justice subsequent arrest notification service for its active licensed attorneys, pursuant to Business and Professions Code section 6054.

2. Implementation Schedule

The Board of Trustees of the State Bar must develop a schedule for implementation of subsection (a) that requires all active licensed attorneys for whom the State Bar does not have fingerprint images to submit fingerprints to the Department of Justice by December 1, 2019.

3. Fingerprint Submission and Processing Costs

All costs of providing criminal history information to and the processing of fingerprints for, the State Bar, including print furnishing and encoding, as required by section 6054, shall be borne by the licensed attorney.

The State Bar will cover the DOJ and FBI processing costs for licensed attorneys who have been granted a fee scaling or fee waiver for annual membership fees pursuant to State Bar Rule 2.15(A) or 2.16(C)(3)(c). These attorneys will pay for all third party print furnishing costs.

Attachment 4 is the full text of the proposed rule.

¹⁰ The proposed rule is limited to only those active licensed attorneys the State Bar does not have fingerprint images for because, as discussed above, the State Bar has already submitted the fingerprint records of approximately 1,500 active licensed attorneys, in addition to the fingerprint records of out-of-state applicants whose State Bar admission is still pending.

B. Policy Analysis

1. All Licensed Attorneys Must Submit or Resubmit Fingerprints By December 1, 2019, on a Schedule Designated by the Board of Trustees

As recognized in the Court's October 20, 2017 letter, requiring fingerprints of all applicants and active members is a "critical component of public protection and strengthens the State Bar's discipline system." Although there are certain criminal reporting requirements for licensed attorneys, courts, and prosecutors, an evaluation of the data reported to the State Bar suggests significant underreporting by licensed attorneys. For example, simply comparing the raw numbers reported by attorneys to the numbers reported by superior courts and prosecuting attorneys, the State Bar found that on average the number of charges attorneys reported was less than half the number of convictions reported by the courts.

Because the specific reporting requirements differ between those charges that attorneys are required to self-report and the convictions that courts are required to report, this discrepancy may be attributed to the differences in the reporting requirements. However, looking more closely at court reported convictions, State Bar staff found that out of 32 felony convictions reported by the courts over a three year time period, 29 of these cases had no corresponding record of a self-report by the attorney of the charges, despite the attorney's obligation to do so pursuant to section 6068(o)(5). Similarly, comparing specific cases where prosecuting attorneys reported filing felony charges against a licensed attorney revealed that that less than half of these cases had been self-reported by the attorney.

Of course, there is also no accurate way to determine whether courts and prosecutors are adequately reporting charges and convictions to the State Bar. Thus, utilization of the automated SAN process through the DOJ will vastly improve the reliability and validity of the data on criminal charges and convictions of licensed attorneys in California.

The proposed rule requires the Board to adopt an implementation schedule with a deadline of December 2019. The Board is in the best position to evaluate State Bar workload and coordinate with the relevant State Bar departments, in order to determine the best use of State Bar resources. The December 1, 2019 deadline provides an almost two year window for active attorneys to be fingerprinted on a set schedule.

2. Licensed Attorneys Should Bear the Cost of Fingerprint Submission, With Cost Reductions for Financial Hardship

SB 36 amends section 6054 to eliminate the language requiring the State Bar to pay for the costs of fingerprint processing of applicants.¹¹ The statute is silent as to whether the licensed attorney must pay for the costs of submission or resubmission of fingerprint to the DOJ, including processing costs. The proposed rule requires licensed attorneys to bear all costs associated with the submission of fingerprints to the DOJ, including print furnishing costs. This means that the attorney will pay the print furnishing costs directly to the vendor at the time he or

¹¹ The proposed rule only applies to costs for licensed attorneys. Staff is not proposing any changes to the current process for applicant fingerprints. Currently, applicants pay third party furnishing costs, and the State Bar pays for DOJ and FBI processing costs. This status quo approach will not result in any new costs to the State Bar as related to the fingerprinting process itself.

she is fingerprinted. The \$49 processing costs will be reflected through an increase in the attorney's fee statement.

The rule also provides that licensed attorneys who have been granted reductions in their annual membership fees based on financial hardship have the same reductions applied to fingerprint processing costs. State Bar rule 2.15(A) provides "fee scaling" for "[a]n active member who has a total gross annual individual income from all sources of less than \$40,000." State Bar rule 2.16(c)(3)(2) permits the Secretary to waive up to \$1,000 in annual membership fees if the member "has a total gross annual household income from all sources of \$20,000 or less."

There are currently 1,184 licensed attorneys who have been granted fee scaling pursuant to rule 2.15(A), and 271 licensed attorneys who have been granted a fee reduction pursuant to rule 2.16(c)(3)(2). As these attorneys will still need to be re-fingerprinted, the State Bar will have to cover the full DOJ and FBI processing costs. This will result in a projected total cost to the State Bar of approximately \$71,295.00.

Attorneys who have been granted these reductions must still pay the third party vendor furnishing costs.

a) Financial Burden on the State Bar if Required to Bear Costs

The projected total cost (processing and furnishing costs) for all active licensed attorney fingerprints to be submitted to the DOJ would be approximately \$15.51 million. If the cost were to be borne by the State Bar, and member fees were not increased to cover these costs, funding would need to be available from the State Bar's General Fund or Admissions Fund. The General Fund accounts for spendable resources that can be used to support most aspects of the State Bar's operations. The Admissions Fund accounts for fees and expenses related to administering the bar examination and other requirements for admission to the practice of law in California. Money in other funds is restricted via statute, bond covenants or similar external restrictions, and is therefore not available to pay fingerprinting costs.

The amount of available funding the State Bar has in the General Fund and Admissions Fund to pay fingerprinting costs can be determined looking at two alternative measures: (1) Reserves, a short-term measure, identifies the availability of cash and other current assets that can be used to pay liabilities in the near future and (2) Fund balance, a long-term measure, calculates the financial condition of the fund, considering all assets and liabilities incurred to date. Reserves and fund balance for the General Fund and Admissions Fund projected through December 31, 2017 follows (in thousands):

	Reserve Amount	Minimum Required Reserve	Available Reserve	Total Fund Balance	Less FB Restricted or Invested in Capital Assets	Available Fund Balance
General Fund	\$21,442	\$15,178	\$12,264	\$82,225	\$(104,433)	\$(22,208)
Admissions Fund	3,465	2,796	3,465	3,465	-	3,465

The reserve amount above represents working capital (current assets minus current liabilities and amounts that are non-spendable, restricted or committed). The required reserve represents the Board of Trustees' policy that all funds carry a minimum reserve representing at least two months of annual expenses.

Total fund balance above represents the fund's total assets minus total liabilities. Available fund balance represents the spendable portion of the fund balance. The General Fund's total fund balance is substantially less than the reserve amount because non-current assets (primarily capital assets) exceed non-current liabilities (primarily pension liability). Of the General Fund's \$82.2 million projected total fund balance, \$104.4 million is not available, resulting in a negative \$22.2 million of available fund balance. The unavailable fund balance is composed of capital assets and revenues restricted for the Legal Services Trust, Bank Settlement, Legal Specialization Lawyers Assistance Program, Justice Gap and Equal Access programs.

The available reserve and available fund balance for the General Fund and Admissions Fund are expected to further decline in 2018 by approximately \$6.8 million and \$240,000, respectively, according to the State Bar's 2018 preliminary budget. The Admissions Fund is projected to fall below the Board of Trustees' minimum reserve requirement of two months operating expenses by approximately \$322,000 at the end of 2018.

In addition to the reserves discussed above, the State Bar is projecting a current year savings (projected as approximately \$3,047,000 as of August 31, 2017) of funds administered by a Special Master overseeing an assessment fund to support the State Bar's discipline operation. The State Bar could request that the Special Master allow this savings to be used to offset a portion of estimated fingerprinting costs. However, this would represent only a small percentage of the total costs necessary to pay for the fingerprinting of all active attorneys. Furthermore, there is no new funding available to offset the staffing costs, described above. As such, any current year savings could be applied to these new staffing needs.

b) Other Entities Shift the Full Cost of Fingerprint Resubmission to Licensees

Requiring licensees to pay the cost of submitting or resubmitting fingerprints to the DOJ, including in circumstances where fingerprints were previously submitted, is in line with the procedures of various other licensing entities. See 16 California Code of Regulations ("CCR") § 2010.05 (requiring veterinarians to submit fingerprints for the purpose of conducting criminal records searches "if an electronic record of the submission of fingerprints no longer exists or was never created" and that "the licensee shall pay any costs for furnishing the fingerprints and conducting the searches."); 16 CCR § 1132 (dental hygienists); 16 CCR § 2517.5 (vocational nurses); 16 CCR § 1399.419.2 (acupuncturists); 16 CCR § 2575.5 (psychiatric technicians); 16 CCR § 37.5 (accountants).

There are also similar regulations that contain identical language regarding the submission of fingerprints in the event the fingerprints "do not exist," but do not specify who will bear the costs for such submission. See *e.g.*, 16 CCR § 1399.722 (requiring podiatrists to submit a full set of fingerprints to the DOJ if, "regardless of the date of initial licensure", "an electronic record of the submission of fingerprints no longer exists."); 16 CCR § 4120 (requiring applicants for renewal of occupational therapy license to submit fingerprints to the DOJ if fingerprints had not been previously submitted or for whom a record of submission of fingerprints no longer exists); 16 CCR § 1419 (same requirement for renewal of registered nurses).

These regulations were adopted pursuant to statutes authorizing licensing boards to adopt regulations necessary to properly regulate their profession. See Bus. & Prof. Code §§ 4808, 2404, 1906, 2841.1, 4933, 4504, and 5010. As such, the boards of these entities determined that, in the interest of public protection, it was necessary to require the re-submission of licensee fingerprints in certain circumstances. See *e.g.*, Bus. & Prof. Code § 2842 ("protection of

the public shall be the highest priority for the Board of Vocational Nursing and Psychiatric Technicians of the State of California in exercising its licensing, regulatory, and disciplinary functions.”).

Notably, these regulations require licensees to pay costs associated with submission of fingerprint records, even if they previously submitted fingerprints with their initial licensing application. These regulations were adopted to ensure that the DOJ and/or FBI had fingerprint records for all current licensees. As with other California licensing entities, the State Bar endeavors to ensure that the DOJ has fingerprint records of all its licensees in order to effectively regulate the profession and protect the public.

FISCAL/PERSONNEL IMPACT

See Discussion Section, II.B.

RECOMMENDATION

RESOLVED, that the Board of Trustees authorizes staff to make available for a 45-day public comment period, the proposed rule to the California Supreme Court included as Attachment 4 to this agenda item.

ATTACHMENT(S) LIST

- ATTACHMENT 1 - October 20, 2017 Letter from the California Supreme Court
- ATTACHMENT 2 - June 28, 2017 Contract with DOJ
- ATTACHMENT 3 - August 28, 2017 Contract with DOJ
- ATTACHMENT 4 - Text of Proposed Rule to the California Supreme Court
- ATTACHMENT 5 - Detailed Workload / Staffing Estimates

ATTACHMENT 4

Public comments on the proposed rule have been compiled into a single document and can be found at the following URL:

[http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/
Public_Comments_Attachment_4_Comments-received.pdf](http://www.calbar.ca.gov/Portals/0/documents/publicComment/2018/Public_Comments_Attachment_4_Comments-received.pdf)

Attachment 5 – Draft Decision Rules for Handling Records of Arrest and Prosecution

RAP Sheet Information	Condition 1	Condition 2	Action
Arrest / No Charges or Conviction	Arrest occurred before the attorney's admission to the bar, and the arrest was reported to Committee of Bar Examiners.	None	Close
	Arrest occurred before attorney was admitted to the bar, but the arrest was not reported to Committee of Bar Examiners.	Applicant had duty to report arrest to CBE (criminal proceedings were pending during moral character evaluation)	Transmit to OCTC Intake Unit
		Applicant did not have duty to report	Close
	Arrest occurred after attorney was admitted to the bar, and arrest was previously known to the Office of Chief Trial Counsel.	None	Close
	Arrest occurred after the attorney was admitted to the bar, but the arrest was not previously known to the Office of Chief Trial Counsel.	Arrest was for a felony	Transmit to OCTC Intake Unit
		Arrest occurred within the past five years	Transmit to OCTC Intake Unit
		Arrest more than five years old and for misdemeanor	Close
Charges / No Conviction	Charge occurred before the attorney's admission to the bar, and the charge was reported to Committee of Bar Examiners.	None	Close
	Charge occurred before attorney was admitted to the bar, but the charge was not reported to Committee of Bar Examiners.	Applicant had duty to report charge to CBE (criminal proceedings were pending during moral character evaluation)	Transmit to OCTC Intake Unit
		Applicant had duty to report charge to CBE (criminal proceedings were pending during moral character evaluation) AND charges still pending	Transmit to OCTC Conviction Monitoring Unit
		Applicant did not have a duty to report	Close
	Charge occurred after attorney was admitted to the bar, and charge was previously known to the Office of Chief Trial Counsel.	None	Close
	Charge occurred after the attorney was admitted to the bar, but the charge was not previously known to the Office of Chief Trial Counsel.	Charge was for a felony	Transmit to OCTC Intake Unit
		Charge occurred within the past five years	Transmit to OCTC Intake Unit
Conviction	Conviction occurred before attorney's admission to the bar, and the conviction was reported to Committee of Bar Examiners.	None	Close
	Conviction occurred before attorney's admission to bar, but the conviction was not reported to Committee of Bar Examiners.	None	Transmit to OCTC Conviction Monitoring Unit
	Conviction occurred after the attorney's admission, but was previously known to the Office of Chief Trial Counsel.	None	Close
	Conviction occurred after the attorney's admission to bar, but was not previously known to the Office of Chief Trial Counsel.	None	Transmit to OCTC Conviction Monitoring Unit